

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
3 AT CHARLESTON

4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 -vs-

7 RONALD BARNETTE,

8 Defendant.

Criminal Action Number:

2:14-00114

Date: July 14, 2014

9 TRANSCRIPT OF PLEA HEARING
10 BEFORE THE HONORABLE THOMAS E. JOHNSTON, JUDGE
11 UNITED STATES DISTRICT COURT

12 A P P E A R A N C E S:

13 For the Government: AUSA MEREDITH GEORGE THOMAS
14 U.S. Attorney's Office
15 P.O. Box 1713
16 Charleston, WV 25326-1713

17 For the Defendant: MICHAEL B. HISSAM, ESQUIRE
18 BAILEY GLASSER LLP
19 209 Capitol Street
20 Charleston, WV 25301

21 Probation Officer: Joshua Smith-Shimer

22 Also Present: Keith Bowie, IRS Special Agent
23 Sherry Payette, FBI Special Agent

24 Court Reporter: Carol Farrell, CRR, RMR, CCP, RSA

25 Proceedings recorded by mechanical stenography; transcript
 produced by computer.

1 PROCEEDINGS had before The Honorable Thomas E.
2 Johnston, Judge, United States District Court, Southern
3 District of West Virginia, in Charleston, West Virginia, on
4 July 14, 2014, at 3:00 p.m., as follows:

5 THE DEPUTY CLERK: The matter before the Court is
6 United States versus Ronald Barnette, Criminal Action Number
7 2:14-cr-00114, scheduled for a plea hearing.

8 THE COURT: Good afternoon. Will counsel please
9 enter their appearances.

10 MS. THOMAS: Meredith George Thomas on behalf of the
11 United States.

12 MR. HISSAM: Mike Hissam on behalf of the defendant,
13 Ronald Barnette, who is present with me in the courtroom.

14 THE COURT: Good afternoon. Mr. Barnette, I am now
15 going to ask the Deputy Clerk to administer an oath to you.

16 THE DEPUTY CLERK: Please raise your right hand.
17 **(RONALD BARNETTE, HAVING BEEN DULY SWORN, TESTIFIED AS**
18 **FOLLOWS:)**

19 THE DEFENDANT: Yes.

20 THE COURT: You may be seated.

21 Mr. Barnette, do you understand that you are now
22 under oath and you must tell the truth and, if you testify
23 falsely, you may face prosecution for perjury or for making a
24 false statement?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Throughout the course of this hearing,
2 I'm going to be asking you a number of questions, and I want
3 to make sure that you and I are communicating clearly, so if
4 at any point you don't understand a question that I ask or
5 anything else that occurs in this hearing, I want you to feel
6 free to speak up and seek clarification.

7 Also, if at any time you need to confer with your
8 attorney, I will be pleased to pause the proceedings to allow
9 you to do so. Do you understand all that?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: All right. I want to begin by asking
12 you, how old are you?

13 THE DEFENDANT: 53.

14 THE COURT: And can you briefly describe your
15 educational background?

16 THE DEFENDANT: Quit in 12th grade.

17 THE COURT: And can you read and write and understand
18 the English language?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Can you briefly describe your work
21 experience?

22 THE DEFENDANT: Operate MRS, Mining Repair
23 Specialists. We run --

24 THE COURT: I'm sorry. You're going to have to
25 repeat what you just said.

—PLEA HEARING—

1 THE DEFENDANT: I'm a business owner, Mining Repair
2 Specialists.

3 THE COURT: I didn't catch that either.

4 THE DEFENDANT: Mining Repair Specialists.

5 THE COURT: All right.

6 THE DEFENDANT: And Holy Smoke Coal.

7 MR. HISSAM: That's Holy Smoke Coal.

8 THE COURT: I need you to speak a little bit more
9 clearly.

10 And was there something else?

11 THE DEFENDANT: A theater.

12 THE COURT: Okay. All right.

13 THE DEFENDANT: That's about it.

14 THE COURT: All right. And have you taken any
15 medicine or drugs or consumed any alcoholic beverages in the
16 last 24 hours?

17 THE DEFENDANT: No, Your Honor.

18 THE COURT: Including prescription drugs?

19 THE DEFENDANT: No, Your Honor.

20 THE COURT: Have you ever been treated for any mental
21 illness or addiction to drugs?

22 THE DEFENDANT: No, Your Honor.

23 THE COURT: Do you know where you are and why you're
24 here today?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you have any hearing impairment or
2 other disability which would prevent you from fully
3 participating in this hearing today?

4 THE DEFENDANT: No, Your Honor.

5 THE COURT: Mr. Hissam, do you have any reason to
6 question the competency of your client?

7 MR. HISSAM: No, sir.

8 THE COURT: All right. I believe the original plea
9 agreement has been provided to me. Is this the same as the
10 copy that was provided in advance?

11 MS. THOMAS: Your Honor, there has been one change,
12 on Page 2 of Exhibit B, which is the second page of the
13 stipulation of facts, two words have been marked out, and it's
14 all been initialed by the parties.

15 THE COURT: Okay. Very well.

16 All right. Turning to the plea agreement then,
17 Mr. Barnette, is that your signature which appears on the
18 ninth and final page of the plea agreement?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And are those your initials that appear
21 on the other pages of the plea agreement?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And have you read and reviewed with your
24 counsel each of the 17 paragraphs of the plea agreement and
25 the two exhibits attached to the plea agreement?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: And do you wish to have the various terms
3 of the plea agreement orally stated on the record or do you
4 believe that that's unnecessary?

5 THE DEFENDANT: It's unnecessary.

6 THE COURT: And do you understand and agree with all
7 of the terms and provisions contained in the plea agreement?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: And, Mr. Hissam, have you reviewed each
10 of the 17 paragraphs of the plea agreement and its exhibits
11 with your client?

12 MR. HISSAM: Yes, Your Honor.

13 THE COURT: And, Mr. Hissam and Ms. Thomas, is there
14 any reason why either of you believe that the various terms of
15 the plea agreement should be orally stated on the record?

16 MS. THOMAS: No, Your Honor.

17 MR. HISSAM: No, Your Honor.

18 THE COURT: All right. Nonetheless, Mr. Barnette,
19 there are some provisions of the plea agreement I want to go
20 over with you, starting with Section 5, which begins on Page 2
21 and runs over onto Page 4, and it's entitled "Forfeiture."
22 And in that section, you agree not to contest an
23 administrative forfeiture of \$400,000. Is that your
24 understanding?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: And Subsection G of Section 5 -- first of
2 all, let me ask you this: Do you understand a waiver is a
3 legal term that means you're giving something up?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: All right. So then in Subsection G of
6 Section 5, do you understand that you are waiving any defenses
7 that you may have to any forfeiture action in this case?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: All right. Next I want to refer you to
10 Section 10 of the plea agreement which is entitled
11 "Termination of Prosecution," and this provides that,
12 essentially, that Diana Barnette will not be prosecuted as a
13 result of this plea agreement if it goes forward.

14 THE DEFENDANT: Yes, sir.

15 THE COURT: All right. Next I want to refer you to
16 Section 11 of the plea agreement, which appears on Page 5 and
17 is entitled, "Stipulation of Facts and Waiver of Federal Rule
18 of Evidence 410." Now, this section relates to a couple of
19 different matters, the first of which is the stipulation of
20 facts, which is attached to the plea agreement as Exhibit B,
21 and I want to turn your attention to that document now. That
22 is a two-page document, and on the second page, is that your
23 signature which appears there?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: And have you read the stipulation of

1 facts?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And do you agree that all the facts
4 contained in the stipulation are true?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: All right. A little bit about what will
7 be happening from here on out. I will be asking the probation
8 officer to prepare a presentence investigation report. That
9 report will contain detailed, recommended factual findings
10 regarding this offense and your background, among other
11 things. Ultimately, at sentencing, I will make factual
12 findings based, at least in part, on the recommendations
13 contained in the presentence report.

14 Now, you've reached an agreement with the government
15 regarding certain facts contained in this stipulation, but I
16 want you to understand that in this process, neither the
17 probation officer nor this Court are bound by that stipulation
18 of facts. Do you understand that?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: And do you further understand that if I
21 make findings of fact at sentencing that are different from or
22 inconsistent with the facts contained in this stipulation, you
23 will still be bound by your guilty plea and would have no
24 right to withdraw it? Do you understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: All right. The other matter addressed in
2 Section 11 of the plea agreement is a waiver of Federal Rule
3 of Evidence 410. Now, Rule 410 generally provides an
4 information or documents regarding plea negotiations, and the
5 stipulation of fact would fall into that category.

6 Those things are generally not admissible at trial,
7 in other words, the government can't use that sort of thing
8 against you at trial, usually. However, under this waiver, if
9 you withdraw from the plea agreement or if it's no longer any
10 good, the plea agreement is no longer any good because you
11 violated one or more of its terms, and there is a subsequent
12 trial, that under this waiver, the government would be allowed
13 to present stipulation of fact in its case in chief or for
14 other purposes at that trial. Do you understand that waiver?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: All right. Next I want to refer you to
17 Section 12 of the plea agreement which starts on Page 5 and
18 runs over onto Page 6. It's entitled, "Agreement on
19 Sentencing Guidelines." And before we get into it, I want to
20 ask you, has your attorney talked with you about the Federal
21 Sentencing Guidelines and how they generally work?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And has he showed you that chart in the
24 back of the book?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: All right. Well, working from that
2 chart, I'm going to have a similar discussion with you. If
3 you will recall from the chart, on the left side of the page
4 there is a series of numbers that run from low to high as you
5 go down the page. Those are offense levels. And the offense
6 level is calculated by starting out with a base offense level,
7 which is a starting point, and that can be adjusted upward or
8 downward, depending on the facts and circumstances of the
9 case. Then you generally arrive at an adjusted offense level.
10 Then consideration is usually given to a reduction for
11 acceptance of responsibility. Has your attorney talked with
12 you about that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: And then you generally after that arrive
15 at a total offense level.

16 Then you go up to the top of the chart and there are
17 six criminal history categories, and you would fall under one
18 of those, depending on the number of points, if any, assigned
19 to any prior convictions that you may have.

20 Then you combine the criminal history category with
21 the total offense level and arrive at a point in the chart
22 that gives a range of months of imprisonment, and -- well, do
23 you understand all this about the guidelines I've told you so
24 far?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: All right. Once we arrive at that
2 guideline range -- and, by the way, there are certain parts of
3 the chart where certain ranges would fall within a part of the
4 chart where there would be alternatives to incarceration.

5 Once we arrive at that range, then I have the
6 authority to sentence you within that range or, under some
7 circumstances, I would have the authority to sentence you
8 outside of that range, either above it or below it. If I do
9 that, based on the factors identified in the guidelines
10 themselves, it's generally known as a departure. If I
11 sentence you outside of the guideline range, again, above it
12 or below it, based on factors outside of the guidelines, it's
13 generally known as a variance. Do you understand everything
14 I've told you about the guidelines?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Has your attorney gone over all these
17 things with you as well?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: All right. With all that in mind then,
20 Section 12 contains an agreement that you reached with the
21 government regarding one or more provisions of the Federal
22 Sentencing Guidelines. Now, this is similar to the
23 stipulation of fact in that the probation officer will include
24 in the presentence report a recommended guideline calculation.
25 Ultimately, at sentencing, I'll make guideline findings based,

1 at least in part, on the probation officer's recommendation.

2 Now, you and the government have reached an agreement
3 with regard to certain provisions of the guidelines here, but
4 I want you to understand once again that in this process,
5 neither the probation officer nor this Court are bound by that
6 agreement on the guidelines. Do you understand that?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Do you further understand that if I make
9 guideline findings at sentencing that are different from or
10 inconsistent with the -- with this agreement, you will still
11 be bound by your guilty plea and would have no right to
12 withdraw it? Do you understand that?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: All right. Next I want to refer you to
15 Section 13 of the plea agreement which appears on Page 6 and
16 is entitled "Waiver of Appeal and Collateral Attack." Now,
17 this section relates to a couple of different procedures that
18 I want to describe to you briefly.

19 An appeal is a procedure by which a party to a case
20 before a District Court like this one and a defendant in a
21 criminal case, it's often a defendant, goes to the Court of
22 Appeals, which is the next level up of the court system, and
23 argues that certain errors or mistakes may have taken place in
24 their case before the District Court.

25 A collateral attack is similar but is a separate

1 civil case that may be filed after a criminal case is over,
2 sometimes referred to as a habeas corpus petition, and in the
3 collateral attack, the defendant may also argue that certain
4 errors or mistakes may have taken place in the defendant's
5 criminal case before the District Court.

6 Now, do you understand those two proceedings, at
7 least as I've briefly described them to you?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: The other thing I want to go over with
10 you is that there are two phases to a criminal case.

11 The first phase is the phase in which guilt or
12 innocence is determined, sometimes by a trial, much more often
13 by guilty plea like what we're doing today. That phase of the
14 case begins -- starts at the very beginning of the case and
15 runs all the way to the point where a finding of guilt is made
16 or innocence is made.

17 If a finding of guilt is made, then we go to the
18 second part or second phase of the criminal case in which the
19 penalty is determined, which ultimately concludes in a
20 sentencing hearing at the end of the case.

21 Now, do you understand the two phases of a criminal
22 case as I briefly described them?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: All right. With all that in mind then, I
25 want to go over -- this first paragraph in Section 13 contains

1 an appeal waiver. I want to go over that with you now.

2 Do you understand that you waive the right to appeal
3 your conviction and any sentence of imprisonment, fine or term
4 of supervised release or the manner in which the sentence was
5 determined on any ground whatsoever with one exception: You
6 may appeal any sentence that is greater than the maximum
7 penalty set forth by statute; do you understand that waiver?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Anything about it that you don't
10 understand or you have questions about?

11 THE DEFENDANT: No, sir.

12 THE COURT: All right. And the second paragraph, do
13 you also understand that you may not file a later civil
14 proceeding, sometimes referred to as a collateral attack or a
15 habeas corpus position, challenging your plea, conviction, or
16 sentence? Do you understand that?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Finally, do you understand that you are
19 in no event waiving your right to claim ineffective assistance
20 of counsel either on appeal or by collateral attack?

21 Do you want me to go over that one again?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: All right. Do you understand that you
24 are in no event waiving your right to claim ineffective
25 assistance of counsel, either on appeal or by collateral

1 attack?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Do you understand that now?

4 THE DEFENDANT: Yes.

5 THE COURT: All right. Finally, I want to turn your
6 attention to Section 14 on Page 7. It's entitled "Waiver of
7 FOIA and Privacy Right." This waiver means you can't go back
8 after this case is over and seek documents or other
9 information about this case from the government, even with a
10 Freedom of Information request. Do you understand that?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And I've neglected one thing. In the
13 final copy of the stipulation of fact, on Page 2, there is a
14 handwritten change. And do you agree with that change?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Are those your initials next to that
17 change?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: In handwriting.

20 All right. Very well. Mr. Hissam, have you
21 thoroughly reviewed the plea agreement with your client?

22 MR. HISSAM: Yes, Your Honor.

23 THE COURT: And do you believe that he fully
24 understands the various terms and provisions of the plea
25 agreement, including the waivers and other matters that I have

1 gone over with him this afternoon?

2 MR. HISSAM: Yes, Your Honor.

3 THE COURT: Mr. Barnette, have you reviewed the
4 agreement in detail with your attorney?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: And do you believe that you've had
7 adequate time to discuss your case fully with your attorney?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Has your attorney answered any questions
10 that you have about your case?

11 THE DEFENDANT: What?

12 THE COURT: Has your attorney answered any questions
13 that you've had about your case?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Mr. Hissam, during your representation of
16 the defendant, has he been cooperative?

17 MR. HISSAM: Yes, Your Honor.

18 THE COURT: Mr. Barnette, has anything further been
19 agreed to, either orally or in writing, that is not contained
20 in the plea agreement?

21 THE DEFENDANT: No, sir.

22 THE COURT: All right. I'll order that the plea
23 agreement be filed. I will find that the defendant
24 understands and agrees to the terms contained in the plea
25 agreement. I will defer accepting or rejecting the plea

1 agreement until sentencing, after the presentence report has
2 been received and considered.

3 Mr. Barnette, have you received and read and reviewed
4 with your attorney the information or charging document that
5 has been proposed in this case?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And do you understand the charges
8 contained in the information?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Would you like me to read the information
11 to you or will you waive the reading of the information?

12 THE DEFENDANT: I'll waive the right.

13 THE COURT: All right. As I understand it, you're
14 pleading guilty to a single-count information which charges
15 you with making a false statement in violation of 18 U.S.C. §
16 1001(a)(2). I now want to go over that charge and that
17 statute in just a little bit more detail with you.

18 Section 1001(a)(2) provides, in pertinent part, that
19 "whoever, in any matter within the jurisdiction of the
20 executive, legislative or judicial branch of the Government of
21 the United States knowingly and willfully makes any materially
22 false, fictitious, or fraudulent statement or representation
23 shall be fined under this title, imprisoned not more than five
24 years or both."

25 Now, in order to establish that charge against you,

1 the government would have to prove each of the following
2 elements, each beyond a reasonable doubt: And they are,
3 first, that you made a false statement in a matter involving a
4 governmental agency; and, second, that you acted knowingly and
5 willfully; and, third, that the false statement was material
6 to a matter within the jurisdiction of the agency.

7 Now, I want to share with you some definitions that
8 apply to what I just told you.

9 Criminal investigations conducted by the IRS are
10 matters within the jurisdiction of a branch of the United
11 States Government for purposes of Section 1001.

12 And an act is done knowingly if done voluntarily and
13 intentionally, not because of mistake or accident or other
14 innocent reason.

15 For purposes of this statute, an act is done
16 willfully if it is done deliberately and not by accident.

17 A false statement may take the form of an affirmative
18 misrepresentation or the concealment of a material fact. In
19 determining whether a statement is material, it is irrelevant
20 whether the false statement actually influenced or affected
21 the decision-making process of the agency or fact-finding
22 body. Rather, a statement is material if it has a natural
23 tendency to influence or is capable of influencing the
24 decision-making body to which it was addressed.

25 Are there any objections to the elements as I have

1 described them?

2 MS. THOMAS: Your Honor, after the last hearing, I
3 was reminded of a couple of recent cases regarding the
4 willfulness standard, and I apologize for bringing it up now
5 and not during the last hearing, but I would like to bring it
6 to the Court's attention, if I may.

7 THE COURT: Okay.

8 MS. THOMAS: Recently, I believe it was on March the
9 10th, the Solicitor General filed two oppositions for
10 petitions of certiorari in two cases, one involved a First
11 Circuit case and one involved a Ninth Circuit case, regarding
12 the term "willfully," in a 1001 context or a false statement
13 context. The department argued in that opposition to petition
14 that "willfully" requires proof that the defendant knew his
15 conduct was unlawful, rather than the deliberately with
16 knowledge standard. I wanted to bring that to the Court's
17 attention.

18 THE COURT: The government argued for the heightened
19 standard?

20 MS. THOMAS: Yes. The government looked the *Bryan*
21 standard which is a 1998 case that is put forth in
22 924(a)(1)(D), I believe that's what the Court was
23 interpreting, an act was undertaken with a bad purpose which
24 requires the government to prove the defendant acted with
25 knowledge that his conduct was unlawful.

1 I would suggest that in either case, the one that is
2 before the Court right now and in the last case, the
3 government would be able to prove both standards beyond a
4 reasonable doubt, but I did want to bring this to the Court's
5 attention.

6 THE COURT: Well, this might be just the opportunity
7 I was looking for to clarify this. I'm not so sure I agree
8 with the government in those cases. I think that "knowingly"
9 and "willfully" in the context of 1001 are basically
10 interchangeable. Apparently, that's not the position of the
11 government, at least that the government's taken in those two
12 cases you've indicated.

13 I mean, if you all want to submit something on that,
14 I'm happy to -- this may be just the opportunity I'm looking
15 for to sort of do my restatement, for what it's worth, on the
16 issue. This is something I'll be looking at sort of as we
17 move toward sentencing. I don't doubt that probably there is
18 a basis here, but I think it's important to have the law
19 clarified. So I really think that's -- that's what I'm
20 thinking about doing is writing an opinion where I go through
21 all this and sort of figure out where I fall out on this whole
22 mess because if you really start looking at the definition of
23 "willfully," the Courts have done a pretty lousy job with it.
24 In fact, I would argue that both Congress and the Courts have
25 pretty well abused the word "willfully" almost out of

1 existence. So you're welcome to file something on it if you'd
2 like.

3 MS. THOMAS: When would the Court like something on
4 that?

5 THE COURT: I mean, I don't think I've set this for
6 sentencing until sometime in October, so 1st of September?

7 MS. THOMAS: All right. I'll file it in both cases,
8 if that's all right, since we'll be dealing with the law in
9 both cases.

10 THE COURT: Yeah, those are the only two of these, of
11 this set of cases, that involve 1001, right?

12 MS. THOMAS: That's correct.

13 THE COURT: And I think we would all agree that on
14 tax-evasion cases, that the heightened standard would apply,
15 and I believe that's how I instructed the defendant --
16 defendants in those cases.

17 MS. THOMAS: And that's correct. And we are not
18 seeking the standard to be that the defendant needs to know
19 the specific provision of the law as you would --

20 THE COURT: Well, unfortunately, there is some
21 language in some of these cases that might hint at that, but I
22 think that's ridiculous. To expect a defendant to know the
23 law, chapter and verse, is silly. So, but I think they --
24 where Congress -- this is the way the Courts have treated it.
25 I'm not sure this is what Congress intended. I'm not sure

1 what Congress intended actually.

2 But with regard to tax cases, the approach I have
3 taken is that, at least a general matter, is the defendant had
4 to have some sense that the defendant was doing something that
5 either the law specifically forbid or was failing to do
6 something that the law required, not chapter and verse, but
7 simply know, for example, that filing a false tax return is
8 unlawful, is forbidden by the law. I think my take on this
9 has always been that in that very narrow category of mostly
10 tax and I guess structuring -- it also applies to structuring,
11 that you have -- basically, you have exception to the notion
12 that ignorance of the law is not an excuse. In those cases,
13 there has to be some knowledge of the law and some
14 understanding of the law to be able to violate it.

15 In every other case, this is my perspective, up until
16 now, where the word "willfully" is used, it is
17 indistinguishable from the word "knowingly" or
18 "intentionally." That's -- that's the approach that I've
19 taken. Because that standard, the knowingly standard, is that
20 the defendant simply had to know what he or she was doing.
21 Absolutely no need to know it was unlawful, but simply know
22 that they were doing something that, as it turns out, was
23 forbidden by the law. But they didn't have to know anything
24 about the law in order to be guilty of it. That's a pretty
25 standard notion of what "knowingly" is, and, generally, in my

1 view, at least up until now, applies in most federal criminal
2 cases.

3 MS. THOMAS: I think the distinction that the United
4 States is putting forth in these cases is that the defendant
5 had to act with a bad purpose to disobey the law. And I
6 realize it might become academic at some point, but we -- I
7 will certainly provide briefing to the Court by September the
8 1st.

9 THE COURT: Well, I would welcome that, and I think
10 that this is the occasion that I'm going to have to, you know,
11 make a call on this and let everybody kind of know where I'm
12 coming from on this troublesome term.

13 Judge King authored an opinion, I think the name of
14 the case is *Bursey*, where he talks about having a -- what's
15 the language? -- the defendant had to have -- he's wrestling
16 with a statute which I believe in that case forbid a person
17 from being -- and I'm paraphrasing this -- in the presence of
18 a security perimeter unlawfully. And where he came out on
19 that one was -- and that one was phrased kind of similarly to
20 this statute. And where he came out on that one was that the
21 defendant had to have some knowledge of the general unlawful
22 nature of his activity. I have no idea what that means. It
23 seems to me you either know it's against the law or you don't.
24 If you do know it's against the law, then the tax version of
25 "willfully" would apply, and if you don't know it's against

1 the law, then we're at "knowingly." I really don't know
2 where you would come -- I don't know where you'd come out with
3 a hybrid of that.

4 And I understand that some courts have recognized
5 that there is like three levels of willfully. That middle
6 level doesn't make a bit of sense to me. Either you knew what
7 you were doing was unlawful or you didn't or, more accurately,
8 you had to know it was unlawful or you didn't, and I don't see
9 how you can sort of know it's generally unlawful, but without
10 slipping into a requirement that you have to know what the law
11 is. That doesn't make any sense to me. But just because it
12 doesn't make any sense to me doesn't mean it's not right. It
13 just means I'm not smart enough to figure it out. So that's a
14 possibility, too. But this is a summary of a much longer --
15 several much longer discussions I've had among my law clerks
16 which rather rapidly become very academic and very theoretical
17 and, unfortunately, not very useful when it comes to the
18 application of law to facts in real-world cases. So that's a
19 long-winded way of saying I look forward to your submission.

20 And, Mr. Hissam, if you would like to weigh in on
21 this, you can. If your client -- you and your client don't
22 want to weigh in on this or participate in the discussion, you
23 don't have to. But I think it would be useful for me to
24 clarify my perspective on it, given my history of being a sort
25 of a stickler on factual-basis issues and wanting to make sure

1 that all those I's are dotted and T's are crossed.

2 So, now, the question is if I come to the conclusion
3 that the definition of "willfully" is something other than
4 what I recited today, do you have any objection to us simply
5 revisiting that issue briefly at sentencing?

6 MS. THOMAS: We would not have an objection.

7 MR. HISSAM: Not from the defendant, Your Honor.

8 THE COURT: All right. Well, then I will -- you want
9 to set two weeks after Ms. Thomas's submission as a deadline
10 to submit something?

11 MR. HISSAM: Yes, Your Honor. At this point, this is
12 new to us. I wasn't aware of the department's position in
13 these cert oppositions. But we certainly would plan to take a
14 look at it and, if necessary, file something with the Court.

15 THE COURT: All right. Well, I will leave it up to
16 you. Neither one of you has to file anything, but I'll give
17 you until then to file something, and then I'll probably write
18 something on this and try to -- try to at least put it to rest
19 in my mind, and in a way that -- the one thing I would strive
20 for is greater clarity than what exists in the law right now.
21 Whether or not I get it right will have to be reserved for
22 another day. Probably what I'll have to do after that is when
23 I -- at one of these plea hearings, I'll reference my opinion
24 in these cases and say this is my perspective on "willfully"
25 and that will guide me in terms of plea hearings, factual

1 bases, and jury instructions from here on out. And everybody
2 will at least know where I'm coming from on it, and there will
3 be something in writing that if someone wants to take it up,
4 I'll be more than happy to have them do that.

5 All right. Let's move on.

6 Mr. Barnette, I now want to go over with you the
7 maximum and any minimum sentences you may face as a result of
8 your plea, and that is a maximum term of imprisonment of five
9 years, a maximum fine of \$250,000 or twice the gross pecuniary
10 gain or loss resulting from your conduct, whichever is
11 greater, a maximum term of supervised release of three years.
12 A mandatory special assessment of \$100 would be required.
13 Restitution could be ordered if it were found to be
14 applicable.

15 Next I want to return to our discussion of the
16 Federal Sentencing Guidelines. They are advisory, meaning
17 they are not mandatory and don't have to be followed, but they
18 will, nevertheless, play an important role in your case from
19 here on out.

20 This Court will consider the factors set forth in 18
21 U.S.C. § 3553(a), including the advisory guidelines, in
22 determining the appropriate sentence in your case. And now I
23 want to ask you some questions that will help me to understand
24 your understanding of the advisory guidelines.

25 Have you discussed with your attorney the various

1 factors which apply in determining what the sentence in your
2 case may be under the advisory guidelines?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And do you understand that on the
5 single-count information, you cannot in any event receive a
6 greater sentence than the statutory maximum that I explained
7 to you earlier?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Do you understand the Court will not
10 determine the sentence for your case until a later date when a
11 presentence report has been completed and both you and the
12 government have had an opportunity to challenge the facts and
13 analysis reported by the probation officer?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: Do you understand that under a concept
16 known as relevant conduct, this Court, in determining the
17 total offense level for sentencing purposes under the
18 guidelines, may take into account any conduct, circumstances
19 or injuries relevant to the crime of which you may be
20 convicted?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Do you understand that after the Court
23 has determined what advisory guidelines apply to your case,
24 the Court has the authority to vary or depart from the
25 advisory guidelines and impose a sentence that is more severe

1 or less severe than the sentence called for by the guidelines?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: Do you understand that in determining
4 your sentence, the Court is obligated to calculate the
5 applicable sentencing guideline range and to consider that
6 range, possible departures under the guidelines, and other
7 sentencing factors under 18 U.S.C. § 3553(a)?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Do you understand that parole has been
10 abolished, and if you are sentenced to prison, you will not be
11 released on parole?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: Do you understand if the Court accepts
14 your plea of guilty and the sentence ultimately imposed upon
15 you is more severe than you had hoped for or expected, you
16 will still be bound by your guilty plea and would have no
17 right to withdraw it?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: Do you understand if you plead guilty to
20 the single-count information which charges you with a felony,
21 you may lose important civil rights such as the right to vote,
22 the right to serve on a jury, the right to hold public office,
23 and the right to own or possess a firearm?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: Now, Mr. Barnette, you have the right to

1 have this matter presented to a federal grand jury. I will
2 explain that process to you briefly. A grand jury is composed
3 of at least 16 and not more than 23 persons, and at least 12
4 grand jurors must find that there is probable cause to believe
5 that you committed the crime with which you are charged before
6 you may be indicted.

7 Now, do you see any benefit to having this case
8 presented to a federal grand jury?

9 THE DEFENDANT: No, Your Honor.

10 THE COURT: Do you see any prejudice or disadvantage
11 to you of not having the case presented to a grand jury?

12 THE DEFENDANT: No, Your Honor.

13 THE COURT: All right. Counsel has been provided
14 with a waiver-of-indictment form, and I want to go over that
15 with you now. It's contains what we call the style of the
16 case, *United States of America versus Ronald Barnette*, the
17 criminal action number, it's entitled "Waiver of Indictment,"
18 and it states as follows: "I, Ronald Barnette, am accused of
19 violating 18 U.S.C. § 1001(a)(2). I have been advised of the
20 nature of the charge, of the proposed information, and of my
21 rights. I hereby waive in open court prosecution by
22 indictment and consent that the proceeding may be by
23 information rather than by indictment."

24 There is a space for you to sign and date, a space
25 for your counsel to sign, and a space for me to sign. Now, do

1 you understand what I just read to you?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And is there anything about it that you
4 don't -- about the waiver-of-indictment process that you don't
5 understand or you have questions about?

6 THE DEFENDANT: No, Your Honor.

7 THE COURT: All right. If you're ready to do so
8 then, I'll ask that you execute the waiver-of-indictment form
9 by signing and dating it, then I'll ask your counsel to sign
10 it and tender it to the Court.

11 MR. HISSAM: May I approach, Your Honor?

12 THE COURT: You may.

13 All right. I will note for the record that the
14 defendant has signed and dated the waiver-of-indictment form,
15 it has been witnessed by his counsel and I'll order -- and I'm
16 now signing it, and I will order that it be made part of the
17 record for this proceeding.

18 Next, Mr. Barnette, I want to talk with you regarding
19 your trial and constitutional rights. You have the right to
20 continue -- I'm sorry. You have the right to plead not guilty
21 and maintain a not-guilty plea throughout these proceedings,
22 including at trial. You have the right to be represented by
23 counsel. You have the right to a speedy and public trial by a
24 jury composed of citizens of this district. You have the
25 right to confront and have your attorney cross-examine

1 witnesses and have your attorney move to suppress any evidence
2 he believes was illegally or unconstitutionally obtained. You
3 have the right not to testify or otherwise incriminate
4 yourself and your exercise of this right cannot be held
5 against you. Do you understand these rights so far?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: You have the right to have the government
8 come in here and prove its case beyond a reasonable doubt.
9 The jury's verdict would have to be unanimous. You have the
10 right to present evidence on your own behalf. You have the
11 right to testify on your own behalf at trial. And you have
12 the right to subpoena witnesses to testify for you. Do you
13 understand all of these rights?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: Any of them that you don't understand or
16 you have questions about?

17 THE DEFENDANT: No, sir.

18 THE COURT: Other than your right to counsel, do you
19 understand that you will be giving up all these rights by
20 entering a plea of guilty?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Do you understand that once you've
23 entered a plea of guilty, there is not going to be a trial, no
24 jury verdict, and no findings of innocence or guilt based on
25 disputed evidence presented to me or to the jury?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Do you believe that you fully understand
3 the consequences of entering a plea of guilty?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: And, Mr. Hissam, having reviewed this
6 case and the plea agreement in detail with your client, do you
7 believe that he fully understands his rights and fully
8 understands the consequences of entering a plea of guilty?

9 MR. HISSAM: Yes, Your Honor.

10 THE COURT: All right. I note that there is a
11 stipulation of facts. Do the parties have any objection to
12 the Court utilizing that in its consideration of the factual
13 basis?

14 MS. THOMAS: No, Your Honor.

15 MR. HISSAM: No, Your Honor.

16 THE COURT: All right. Very well. The Court will so
17 proceed.

18 I do intend to defer a factual-basis finding until
19 sentencing.

20 Mr. Barnette, will you please stand.

21 As to the charge contained in the single-count
22 information, how do you plead, sir? Guilty or not guilty?

23 THE DEFENDANT: Guilty.

24 THE COURT: You may be seated.

25 Your counsel has been provided with a written

1 plea-of-guilty form. I would ask that you go over that with
2 him if necessary, sign and date it, and then I will ask him to
3 sign it and tender it to the Court.

4 MR. HISSAM: May I approach, Your Honor?

5 THE COURT: You may.

6 All right. I will note for the record that the
7 defendant has signed and dated the written plea-of-guilty form
8 and it has been witnessed by his counsel, and I will order
9 that it be made a part of the record for this proceeding.

10 Mr. Barnette, is this plea the result of any threat
11 or coercion or harassment of you by anyone?

12 THE DEFENDANT: No, sir.

13 THE COURT: Is it the result of any promise or
14 inducement other than is contained in the plea agreement?

15 THE DEFENDANT: No, Your Honor.

16 THE COURT: Are you pleading guilty to protect
17 anyone?

18 THE DEFENDANT: No, sir.

19 THE COURT: Are you acting voluntarily and of your
20 own free will in entering this guilty plea?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Has anyone promised or predicted the
23 exact sentence which will be imposed upon you in this matter?

24 THE DEFENDANT: No, sir.

25 THE COURT: Do you understand no one could know at

1 this time the exact sentence which will be imposed?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Has your attorney adequately represented
4 you in this matter?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Has your attorney left anything unknown
7 which you think should have been known?

8 THE DEFENDANT: No, sir.

9 THE COURT: Have you or your attorney found any
10 defense to the charge contained in the information?

11 (Conversation held off the record between defense
12 counsel and the defendant.)

13 THE DEFENDANT: No, sir.

14 THE COURT: All right. Just to be sure, have you all
15 found any defense to the charge contained in this information?

16 THE DEFENDANT: No, sir.

17 THE COURT: All right. Are you, in fact, guilty of
18 the crime charged in the information, in other words, did you
19 do it?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: All right. I will find that the
22 defendant is competent and capable of entering an informed
23 plea, that the plea is freely and voluntarily made, that the
24 defendant understands the nature of the charges and is aware
25 of the consequences of the plea. I will find that the

1 defendant understands his rights and understands that he's
2 giving up these rights by entering a plea of guilty.

3 I will defer a factual-basis finding, I will accept
4 the plea of guilty, and I will defer adjudging the defendant
5 guilty until the time of sentencing.

6 I will ask the probation officer to prepare a
7 presentence investigation report. Mr. Barnette, it is
8 important that you cooperate fully with the probation officer
9 in the preparation of the presentence report. If you fail to
10 cooperate fully and truthfully with the probation officer, you
11 may be subject to an enhancement of your sentence and the
12 forfeiture of certain sentence reductions for which you might
13 otherwise be eligible.

14 It's also important that you not commit any
15 additional crimes between now and sentencing as there may be
16 additional punishments imposed for committing additional
17 crimes.

18 I'm going to set this matter for sentencing on
19 October 20th, 2014, at 3 p.m. I will put my other
20 presentencing dates in my post-plea order.

21 Ms. Thomas, what's the government's position with
22 regard to bond?

23 MS. THOMAS: No opposition for the defendant to be on
24 bond.

25 THE COURT: All right. Hearing no objection, I will

1 place the defendant on \$10,000 unsecured bond under the
2 standard conditions, as well as those recommended in the
3 Pretrial Services report.

4 I've signed my part of the paperwork already.
5 Mr. Hissam, you and your client just need to take care of the
6 rest of it with the Courtroom Deputy at the conclusion of the
7 hearing.

8 MR. HISSAM: Your Honor, if I could address one
9 modification to the standard bond condition. For
10 Mr. Barnette's businesses, he has occasion to travel to the
11 Western District of Virginia and the Eastern District of
12 Kentucky, and we would ask the Court's permission that he be
13 allowed to travel to those two districts in addition to the
14 Southern District.

15 THE COURT: Is there any objection?

16 MS. THOMAS: No objection.

17 THE COURT: All right. I will allow that. I suppose
18 we're going to have to modify the paperwork. It might just
19 take a couple minutes. But probation has no problem with
20 that, either?

21 THE PROBATION OFFICER: No, Your Honor.

22 THE COURT: Okay. Very well. So we'll go ahead and
23 take care of that paperwork. Anything else we need to take
24 care of today?

25 MS. THOMAS: No, Your Honor.

1 MR. HISSAM: No, Your Honor.

2 THE COURT: All right. Thank you.

3 THE LAW CLERK: All rise.

4 THE COURT: Ms. Thomas -- let's go back on the record
5 real quick.

6 Ms. Thomas, I will ask you to notify Mr. Gillooly
7 with regard to the deadlines we talked about.

8 MS. THOMAS: I will.

9 THE COURT: All right. Thank you.

10 THE LAW CLERK: This Court is adjourned.

11 (The proceedings concluded at 3:50 p.m.)

12 * * * * *

13 **REPORTER'S CERTIFICATE**

14

15 I, **Carol Farrell, CRR, RMR, CCP, RPR**, Official Court
16 Reporter of the United States District Court for the Southern
17 District of West Virginia, do hereby certify that the
18 foregoing proceedings are a true and accurate transcript of
19 the testimony as taken stenographically by and before me at
20 the time, place, and on the date hereinbefore set forth.

21 I further certify that I am neither related to any of the
22 parties by blood or marriage, nor do I have any interest in
23 the outcome of the above matter.

24

25 **/S/ Carol Farrell, CRR, RMR, CCP, RPR**